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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

JESUS RAYMON VALENZUELA, Plaintiff and Appellant, v. UNIFIED WESTERN GROCERS, INC., et al., Defendants and Respondents.	B278090 (Los Angeles County Super. Ct. No. BC577655)

APPEAL from a judgment and post-judgment order of the Superior Court for Los Angeles County, Mel Red Recana, Judge. Affirmed.

Shegerian & Associates, Inc., Carney R. Shegerian; Gladius Law and Alyssa K. Schabloski for Plaintiff and Appellant.

Hill, Farrer & Burrill, Casey L. Morris and James A. Bowles for Defendants and Respondents.

Plaintiff Jesus Raymon Valenzuela appeals from the summary judgment entered against him and in favor of defendants Unified Grocers, Inc., Certified Grocers of California, Ltd., Unified Grocers[1] (collectively, Unified), and Tim Lucchino (erroneously sued as Tim Lichino), and the denial of his motion for a new trial. He contends the trial court erred in granting summary judgment because there were disputed issues of fact precluding summary adjudication of his claims for disability discrimination under the California Fair Employment and Housing Act (FEHA) (Gov. Code, § 12900, et. seq.), retaliation for taking leave under the California Moore-Brown-Roberti Family Rights Act (CFRA) (Gov. Code, § 12945.1, et seq.), and wrongful termination. He also contends the trial court abused its discretion by excluding evidence of defendants' conduct prior to a settlement agreement Valenzuela entered into with United in which he released all claims related to his employment with United. Finally, he contends the trial court erred by denying his post-judgment motion for a new trial based upon new evidence.

We conclude the trial court correctly found there were no disputed material facts and that Unified was entitled to judgment as a matter of law. We also find that Valenzuela has failed to demonstrate how he was prejudiced by any evidence the trial court excluded. Finally, we conclude the trial court did not abuse its discretion by rejecting Valenzuela's assertion of newly discovered evidence in denying the new

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[1] Unified Grocers, Inc. is the successor of Unified Western Grocers, Inc. and its predecessor, Certified Grocers of California, Ltd.

trial motion. Accordingly, we affirm the judgment and the denial of the motion for new trial.

BACKGROUND

Unified is a manufacturer and distributor of wholesale grocery and general merchandise products. Valenzuela worked at Unified's distribution warehouse in Commerce, California. At the time of the events at issue in this lawsuit, he was a forklift operator.

A. *Duties of Forklift Operators at Unified*

The job of a forklift operator at Unified's warehouse is to move pallets of product from "reserve slots" (where product is stored) to "pick slots" (where pallets are staged for loading onto trucks for delivery). Each slot (whether reserve or pick) is assigned a number/letter designation, and each pallet is assigned a number. The forklifts are equipped with radio frequency computers (RF System) that direct the forklift operators to move pallets from one specified slot to another specified slot. The forklift operators enter a code when they have completed each move, and the RF System gives them new directions. Unified thus is able to measure each forklift operator's productivity, which it uses to discipline employees who fail to meet production standards and to provide incentive bonuses to employees who exceed those standards. Unified also conducts random audits of all forklift operators on a daily basis in order to prevent unauthorized pallet movements that could disrupt Unified's business by interfering with its

computerized inventory and lead to errors in the products provided to clients.

Unified has written procedures ("Mech. and Conventional Replenishment Procedures") that forklift operators in the warehouse must follow. These procedures instruct the operators on what they must do, including the codes they must enter into the RF System, in the event they are not able to complete a direction given to them by the RF System (e.g., if the specified pallet is not in the location given, or the pallet will not fit in or is not needed at the designated slot). Those procedures include specified procedures that must be followed if an operator is directed to move a partial pallet. If an operator does not follow the directions given by the RF System (e.g., moves the wrong pallet) or the procedures (e.g., fails to key in the correct code), Unified refers to it as an "unauthorized function." If there is an unauthorized function, the computer system will lose track of pallet locations in the warehouse. Therefore, Unified disciplines operators for unauthorized functions.

B. *Valenzuela's Employment at Unified*

Valenzuela was employed by Unified from 2000 until his termination in July 2013. As an hourly worker at the warehouse, Valenzuela was represented by the International Brotherhood of Teamsters Local 630 (the Teamsters) as his exclusive bargaining agent under the Teamsters' collective bargaining agreement with Unified.

Valenzuela originally was hired in 2000 as an order selector, and was transferred to a forklift operator position in 2007, working the

night shift. Beginning in 2002, Valenzuela had to take intermittent leaves of absence under the CFRA to help care for his two sons, both of whom had medical issues. As his eldest son got older, he had to take leaves of absence more frequently in order to care for him. According to the Director of Labor Relations for Unified, the use of leaves of absence under the CFRA is commonplace; approximately half of the 250 employees at the Commerce warehouse have taken such leaves since 1998.

In 2012, Valenzuela was transferred to the day shift as a forklift operator, and Tim Lucchino became his immediate supervisor. At his deposition, Valenzuela testified that Lucchino wanted things done differently than the way everyone had been doing things. He imposed a lot more rules about how things needed to be, and had a stricter attitude with all the employees. Despite the new rules and stricter attitude, the number of disciplinary notices Valenzuela received did not significantly change. From 2004 through 2013, 35 disciplinary notices were issued to Valenzuela: four in 2004, one in 2005, six in 2006, one in 2007, six in 2008, five in 2009, three in 2010, two in 2011, four in 2012, and three in 2013.[2]

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[2] We note that in his declaration filed in opposition to the summary judgment motion, Valenzuela stated that after Lucchino became his supervisor he began to receive disciplinary notices for errors for which his previous supervisors had not disciplined him. This statement does not appear to be supported by the disciplinary notices in his personnel file. Although he worked only half a year in 2012 and received four notices, this is not a significant increase from previous years in which he received six notices.

1. *Incident Leading to Suspension*

On July 5, 2012, Valenzuela broke a sprinkler pipe in the warehouse while operating his forklift, causing over $10,000 in damage. According to Valenzuela, he was assigned to move a certain pallet from slot 51-436L to another slot. Before he completed the move, he saw another pallet protruding several inches out of slot 51-435F, which he believed posed a safety hazard. He attempted to push the pallet all the way into slot 51-435F to keep it from falling, and in doing so he accidently hit a sprinkler head, causing the sprinkler to burst. He immediately notified one of his shift supervisors.

Valenzuela met with Lucchino a few hours later. Lucchino reviewed the RF System records, and they did not support Valenzuela's explanation. Instead, the records showed that Valenzuela had moved the pallet that broke the sprinkler from slot 51-435L into slot 51-435F. They showed that Valenzuela attempted to override the RF System to authorize him to move that pallet rather than the original pallet he had been directed to move, but the RF System rejected the override. Valenzuela denied attempting to override. Lucchino believed that Valenzuela was being untruthful, and he conferred with Unified's labor relations representative, Lylwyn Esangga, to determine what should be done; they concluded he should be terminated. Esangga and Lucchino then conferred with Unified's Director of Labor Relations, John Meno, who agreed with the decision to terminate.

Before Unified was able to terminate his employment, Valenzuela went on a medical leave of absence due to stress and an acute lumbar strain injury. When he returned from medical leave almost six months

later, on December 30, 2012, Valenzuela was suspended pending termination.

2. *Last Chance Agreement*

Valenzuela filed a grievance with the Teamsters and, following negotiations, Unified, Valenzuela, and the Teamsters entered into a settlement agreement referred to as a "last chance agreement"[3] on January 21, 2013.[4] The parties agreed that Unified would convert Valenzuela's termination to a disciplinary suspension, and that the work time Valenzuela lost from December 30, 2012 through January 20, 2013 would constitute the term of the suspension. The parties also agreed that the suspension "is also considered to be a last and final written warning to [Valenzuela, and] that any future conduct of a similar or related nature (unauthorized functions on the RF Systems) shall lead to the termination of [Valenzuela's] employment." This term was to remain in effect for 260 working days from the date of the agreement.

In addition, Valenzuela agreed to "forbear from hereafter asserting any claims against the Employer for any alleged harm flowing from his employment with [Unified], to date." Valenzuela also specifically agreed to release Unified and its employees from any and all claims to date, including claims for discrimination or retaliation, known

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[3] According to Unified's Director of Labor Relations, Unified has used similar agreements to resolve grievances with the Teamsters many times.

[4] Valenzuela and Unified signed the agreement on January 18, 2013, but the Teamsters did not sign it until January 21, 2013.

or unknown, arising out of his employment with Unified, and waived all rights conferred by California Civil Code section 1542.

3. *Termination of Employment*

Valenzuela returned to work after the execution of the last chance agreement. In July 2013, warehouse supervisor Louis Garcia conducted a random daily audit of forklift operators in the Mechanized Warehouse and discovered that Valenzuela had been directed to move an entire pallet into a certain slot, but he had instead moved one case into the slot. Garcia investigated further, and discovered that Valenzuela had moved a single case instead of an entire pallet contrary to the direction of the RF System on at least one other occasion. He reported his discovery to Lucchino and Esangga (the labor relations representative).

On July 30, 2013, Esangga and warehouse managers Mack Moore and Lucchino met with Valenzuela and Teamsters steward Terry Boyer. Valenzuela admitted moving the cases into the slots instead of the entire pallet. He said that he did so because the entire pallet would not fit into the designated slots, and that he had never been told that moving a single case instead of an entire pallet was a violation of the RF System. He said that he moved the partial pallet so that the computer would show that the move had been completed.

In fact, Unified's written procedures direct operators to contact a supervisor if the RF System directs the operator to move a pallet into a slot where it will not fit. In the Mechanized (Mech) warehouse, where Valenzuela was working, the RF System only directs operators to move full pallets, and moving partial pallets is never done because it would

disrupt the computer inventory and location system.[5] This is in contrast to areas of the warehouse other than Mech, such as conventional or general merchandise, where partial pallets regularly are moved. After Garcia reported his discovery regarding Valenzuela, Lucchino did a report on every forklift operator in Mech going back the previous two weeks, and the only person he found who moved a partial pallet was Valenzuela, who did it twice, two days apart. Lucchino stated in his deposition that had Valenzuela "problem coded it [on the RF System], and followed procedures" he would not have been in trouble.

On August 3, 2013, Valenzuela was called into a meeting with Esangga, Moore, and others, and Esangga informed him that his employment was being terminated for conducting a partial pallet move in the Mech warehouse.

C. *The Present Lawsuit*

After his termination, Valenzuela filed a grievance with the Teamsters under the collective bargaining agreement. The business agent for the union told him that because of the last chance agreement there was nothing the Teamsters could do. He told Valenzuela that the union had seen all of the evidence, and concluded it was not going to pursue the matter.

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[5] In response to an interrogatory Valenzuela propounded, Unified stated that it was not aware of any employee other than Valenzuela who moved a partial pallet in the Mechanized warehouse in the previous five years.

Valenzuela then filed the instant lawsuit, alleging claims for violation of the CFRA, retaliation for taking CFRA leave, disability discrimination, breach of express oral contract not to terminate without good cause, breach of an implied-in-fact contract not to terminate without good cause, negligent hiring, supervision, and retention, wrongful termination in violation of public policy, violation of Labor Code section 1102.5, and intentional infliction of emotional distress.[6]

Defendants filed a motion for summary judgment or, in the alternative, summary adjudication a year later, asserting (1) the complaint was barred by the preclusive legal effect of the last chance agreement; (2) the complaint was preempted by section 301 of the federal Labor Management Relations Act; (3) the complaint was barred because Valenzuela could not show that Unified terminated his employment for any unlawful, discriminatory, or retaliatory motive; and (4) Valenzuela could not produce evidence to support the required elements of each cause of action. In support of their motion, defendants submitted declarations from, among others, Tim Lucchino and John Meno (the Director of Labor Relations), discussing how Unified's warehouse operated, Valenzuela's employment history, and the reasons for Valenzuela's suspension and termination. They also submitted excerpts from Valenzuela's deposition, including testimony in which he admitted that he had moved partial pallets in the Mech warehouse and

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[6] Because Valenzuela's appeal challenges the summary judgment only as to the claims for disability discrimination, CFRA leave retaliation, and wrongful termination, our discussion will be limited to those claims.

that he did not have any evidence or proof that his use of family medical leave motivated, in whole or in part, Unified to terminate him. Finally, they submitted various documents, including the last chance agreement and Unified's written policies and procedures for forklift operators.

In opposition to the motion, Valenzuela submitted his own declaration, giving his version of the events at issue, and stating that he was audited more and received more disciplinary notices after he started working under Lucchino's supervision than he had received when he had worked under other supervisors. He also stated that he was aware of at least two other employees whose employment with Unified was terminated shortly after taking medical leaves of absence. In addition to his declaration, he submitted excerpts of deposition testimony from Lucchino and other Unified management personnel, e-mail communications among management discussing his situation, various written policies and employee handbooks, and documentation regarding his leaves of absence. He argued that there were disputed issues regarding whether there was a written or unwritten policy prohibiting partial pallet moves in the Mech warehouse, and that that dispute, along with the timing of Unified's action, gives rise to an inference of pretext. He also argued that evidence (i.e., his declaration and deposition testimony) that Lucchino targeted and scrutinized him more than employees who did not take family medical leave precluded summary judgment. Finally, he argued that his claims were not pre-empted by the federal Labor Management Relations Act because they do not require an interpretation of the collective bargaining agreement.

In ruling on the summary judgment motion, the trial court noted it was undisputed that Valenzuela entered into the last chance agreement, and therefore "it does not matter whether Unified was right in disciplining [Valenzuela] over the July 2012 incident. [Valenzuela] agreed to accept such discipline in exchange for continued employment. Thus, the scope of this lawsuit is limited to the adverse employment actions taking place between January and August 2013." The court also observed that the federal Labor Management Relations Act did not preempt Valenzuela's claims because those claims do not assert that the last chance agreement was unenforceable under the collective bargaining agreement.

The court then addressed the claims at issue in this appeal. It found that defendants met their burden to show that Unified's termination of Valenzuela's employment was for legitimate, nondiscriminatory reasons -- i.e., it was based upon his supervisor's belief that Valenzuela engaged in unauthorized functions on the RF System, which, under the last chance agreement, was ground for immediate termination.[7] Therefore, the burden shifted to Valenzuela to show that this was a pretext for discrimination. And the court found that Valenzuela's "circumstantial evidence falls far short of establishing pretext."

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[7] We note that the court, and the parties, refer to Valenzuela engaging in unauthorized functions as "violating" the last chance agreement. But that conduct does not *violate* the agreement. It simply provides grounds for immediate termination of employment under the agreement.

The court noted that Valenzuela's evidence that other employees were uncertain about the application of the rule that no partial pallet moves were allowed[8] did not mean that Unified's insistence that the rule applied in the Mech warehouse was weak, implausible, inconsistent, incoherent, or contradictory.

The court also noted that the fact that disciplinary write-ups increased under Lucchino does not allow the inference of any animosity towards Valenzuela, especially since Valenzuela did not show that the write-ups were baseless.

Finally, the court found that the timing of Valenzuela's termination did not warrant an inference of pretext, given that he had taken family and medical leave on numerous occasions in the years leading up to the July 2012 incident and was never retaliated against for doing so. In addition, the court noted that Valenzuela's testimony that two other employees were terminated after taking leaves of absence was insufficient to support pretext in his case because one of the terminations took place more than ten years before Valenzuela's termination, and Valenzuela could not recall the details of the other termination.

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[8] Valenzuela submitted deposition testimony from Lucchino in which Lucchino admitted that some employees came to him after Valenzuela was terminated expressing concern about whether partial pallet moves were allowed. Lucchino explained that those employees were unaware of the circumstances involving Valenzuela, i.e., that he had failed to enter the proper code and follow the procedures.

Based upon its findings, the court concluded that Valenzuela could not demonstrate that his termination violated FEHA or CFRA, and that defendants were entitled to judgment as a matter of law on his claims.

Following entry of judgment, Valenzuela filed a motion for new trial on the grounds of error in law, abuse of discretion, newly discovered evidence, and irregularity of proceedings.[9] With regard to the newly discovered evidence ground, Valenzuela argued that the new evidence showed that defendants' reason for terminating his employment was pretext for discrimination and retaliation. The asserted new evidence consisted of declarations from two former co-workers and a new declaration from Valenzuela. The motion was accompanied by a declaration from Valenzuela's attorney, Monica Boutros, who stated that she "attempted to reach" the two former employees "[a]t the time [she] was drafting the Opposition [to defendants' motion for summary judgment]," but she was unable to reach them to obtain declarations for the opposition, and that the former employees "ha[ve] now become available." Boutros also stated that Valenzuela's new declaration is based upon research he conducted "by reaching out to sources that were not available" when he submitted the opposition to the summary judgment motion.

The trial court denied the new trial motion, finding that Valenzuela failed to demonstrate the requisite diligence in seeking the

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[9] Because Valenzuela challenges the trial court ruling on the new trial motion only on the newly discovered evidence ground, we limit our discussion of the motion and ruling to that ground.

newly-discovered evidence. The court found that Boutros's statements that she "attempted to reach" the new witnesses were too vague to show reasonable diligence, because she failed to explain when she first attempted to contact them or how many times she attempted to contact them. The court also noted that had the witnesses' unavailability actually been an issue, Valenzuela should have sought a continuance, or sought to subpoena them. Although the court acknowledged that failing to seek a continuance is not dispositive of diligence, it found that Boutros's failure to raise the issue of the new witnesses' unavailability "completely undermines her credibility." Finally, the court noted that Valenzuela's declaration was not new evidence, since his declaration testimony "was equally available before and after summary judgment was granted."

Valenzuela timely filed a notice of appeal from the judgment and the order denying his new trial motion.

DISCUSSION

Valenzuela contends (1) the trial court erred in granting summary judgment because there were disputed issues of facts regarding whether Unified's proffered reasons for his termination were pretext for discrimination or retaliation; (2) the trial court improperly limited the scope of admissible evidence; and (3) the trial court erred in denying his motion for new trial. His contentions are not well taken.

A. *Summary Judgment Motion*

1. *Standard of Review*

In the trial court, a defendant moving for summary judgment must present evidence that one or more elements of the plaintiff's claim cannot be established or that there is a complete defense to the claim. If the defendant meets that burden of production, the burden shifts to plaintiff to show that a triable issue of material fact exists as to that claim or defense. (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850.) The plaintiff shows that a triable issue of material fact exists by pointing to evidence that would allow a reasonable trier of fact to find that fact in favor of the plaintiff. (*Ibid.*) If plaintiff fails to do so, the defendant is entitled to judgment as a matter of law.

On appeal from a summary judgment, we make "an independent assessment of the correctness of the trial court's ruling, applying the same legal standard as the trial court in determining whether there are any genuine issues of material fact or whether the moving party is entitled to judgment as a matter of law." (*Iverson v. Muroc Unified School Dist.* (1995) 32 Cal.App.4th 218, 222.) Like the trial court, we must strictly construe the moving party's evidence and liberally construe the opposing party's evidence, and we must consider all inferences favoring the opposing party that a trier of fact could reasonably draw from the evidence. (*Binder v. Aetna Life Ins. Co.* (1999) 75 Cal.App.4th 832, 838.)

2. *Law Governing Discrimination/Retaliation Claims*

In analyzing employment discrimination claims, California courts apply the three-stage burden shifting test established by the United States Supreme Court in *McDonnell Douglas Corp. v. Green* (1973) 411 U.S. 792. (*Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 354 (*Guz*).) Under that test, the plaintiff has the initial burden to establish a prima facie case of discrimination. "Generally, the plaintiff must provide evidence that (1) he was a member of a protected class, (2) he was qualified for the position he sought or was performing competently in the position he held, (3) he suffered an adverse employment action, . . . and (4) some other circumstance suggests discriminatory motive." (*Id.* at p. 355.)

If the plaintiff satisfies this initial burden, a presumption of discrimination arises and "the burden shifts to the employer to rebut the presumption by producing admissible evidence, sufficient to 'raise[ ] a genuine issue of fact' and to 'justify a judgment for the [employer,]' that its action was taken for a legitimate, nondiscriminatory reason." (*Guz*, *supra*, 24 Cal.4th at pp. 355–356.) "If the employer sustains this burden, the presumption of discrimination disappears. [Citations.] The plaintiff must then have the opportunity to attack the employer's proffered reasons as pretexts for discrimination, or to offer any other evidence of discriminatory motive." (*Id.* at p. 356.)

"In an appropriate case, evidence of dishonest reasons, considered together with the elements of the prima facie case, may permit a finding of prohibited bias. [Citations.] The ultimate burden of persuasion on

the issue of actual discrimination remains with the plaintiff. [Citations.]" (*Guz*, *supra*, 24 Cal.4th at p. 356.)

3. *Application to the Present Case*

Although the parties present numerous arguments as to why summary judgment in this case should be reversed or affirmed, the propriety of the summary judgment comes down to two material facts. First, Valenzuela entered into the last chance agreement, which provided that he would be terminated if he engaged in an unauthorized function on the RF System. This fact is not disputed. Second, Valenzuela performed an unauthorized function on the RF System. Valenzuela contends that this fact is disputed in that the evidence suggests that Unified's assertion that he performed an unauthorized function was pretext because (1) there was no documentation corroborating Unified's prohibition of partial pallet moves in the Mech warehouse; (2) Unified deviated from their "no partial pallet moves" policy; (3) Unified had a corporate culture of tolerating bias; and (4) the timing of Valenzuela's suspension was suspect. None of Valenzuela's contentions raises a dispute sufficient to survive summary judgment.

a. *Lack of Documentation*

Valenzuela contends that lack of documentation setting forth Unified's policy that partial pallet moves are not allowed in the Mech warehouse is circumstantial evidence that the policy did not exist. Even if we agreed with this contention, it is irrelevant. The undisputed evidence is that the RF System directed Valenzuela to move a *full* pallet

to a specific slot,[10] but he moved a *partial* pallet because a full pallet would not fit in the specified slot, and failed to follow the written policy regarding what a forklift operator must do if directed to deliver a pallet to a slot where it would not fit. Thus, there is no true dispute that in doing so, he engaged in an unauthorized function.

b. *Deviation from Policy*

Valenzuela contends that, because Unified has a manual that includes instructions on how to perform a partial pallet move, Unified deviated from the policies applicable to forklift operators by terminating him for performing a partial pallet move. While it is true that the Unified manual contemplates partial pallet moves -- which Unified concedes are allowed in areas of the warehouse other than in the Mech warehouse -- that fact does not suggest that Unified's reason for terminating Valenzuela was pretext because, as discussed above, he was directed to move a full pallet and did not follow the written procedures when he discovered there was no room in the slot for the full pallet.

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[10] At oral argument, counsel for Valenzuela argued for the first time that there was a disputed issue regarding whether the RF System directed Valenzuela to move a full pallet. The evidence in the record does not support this. Lucchino stated in his declaration, which Unified submitted in support of its summary judgment motion, that Valenzuela admitted he had moved a single case rather than the full pallet he had been directed by the RS System to move. Although Valenzuela testified at his deposition that "[i]t's possible" that someone directed him to move a partial pallet, he said that he had no specific recollection of it, or of the RS System directing him to do so.

c. *Corporate Culture*

Valenzuela's contention that Unified had a corporate culture of tolerating bias is based upon his statement in his declaration that after Lucchino became his supervisor he began to receive disciplinary notices for trivial errors that his previous supervisors had not disciplined him for, and Unified did not take any action after he complained to another supervisor about Lucchino's "mistreatment" of him. Valenzuela did not, however, provide any evidence to show that the disciplinary notices he received from Lucchino were baseless. Moreover, given Valenzuela's own testimony that Lucchino was stricter with all employees, it is not reasonable to infer that that Lucchino's treatment of him was due to bias,[11] much less that Unified's failure to take action on Valenzuela's complaint demonstrates a corporate culture of tolerating bias.

d. *Timing*

Valenzuela contends that the fact that he was suspended immediately after he returned from medical leave in December 2012 is suspect, and suggests that defendants held a discriminatory animus; and this discriminatory animus shows that his subsequent termination was motive by bias. The undisputed evidence, however, shows that Unified intended to suspend Valenzuela pending termination *before* he went out on medical leave and it simply imposed that suspension when

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[11] For this reason, Valenzuela's argument that Unified is liable for wrongful termination under a "cat's paw" theory fails. Because Valenzuela failed to present evidence from which a trier of fact reasonably could infer that Lucchino was motivated by discriminatory animus, there was no discriminatory action to be imputed to Unified.

he returned. Thus, it cannot reasonably be inferred from the timing of the suspension that defendants held a discriminatory animus.

B. *Exclusion of Evidence*

Valenzuela contends the trial court abused its discretion by limiting the scope of admissible evidence to conduct after January 2013. The problem with his contention is that Valenzuela fails to point to any specific evidence the trial court excluded, or how that evidence could have raised a disputed issue of material fact. Thus, we could deem this contention waived. (*Guthrey v. State of California* (1998) 63 Cal.App.4th 1108, 1115 ["It is the duty of counsel to refer the reviewing court to the portion of the record which supports appellant's contentions on appeal. [Citation.] If no citation 'is furnished on a particular point, the court may treat it as waived'"].) In any event, we find the contention is not well taken.

The only evidence the trial court expressly excluded (by sustaining defendants' evidentiary objections) was portions of Valenzuela's declaration in which he stated matters outside his personal knowledge or opined about Lucchino's or Unified's purported motive. While the trial court stated the scope of the lawsuit -- i.e., the liability for allegedly discriminatory acts -- was limited to the adverse employment actions taking place between January and August 2013, there is no indication in its ruling that it did not consider evidence of events before January 2013 in concluding that defendants were entitled to summary judgment. For example, the trial court addressed in its ruling Valenzuela's evidence relating to the alleged increase in disciplinary

write-ups after Lucchino became his supervisor, as well as evidence Valenzuela submitted regarding the July 2012 sprinkler incident. The court also addressed Valenzuela's evidence regarding his work history in the years before Lucchino became his supervisor. In short, Valenzuela's contention that the trial court improperly limited the scope of admissible evidence -- rather than just the scope of liability -- is not supported by the record.

C. *Motion for New Trial*

Valenzuela contends the trial court abused its discretion in denying his new trial motion on the ground of newly discovered evidence. We disagree.

"Generally, a party seeking a new trial on this basis must show that '(1) the evidence is newly discovered; (2) he or she exercised reasonable diligence in discovering and producing it; and (3) it is material to the . . . party's case.'" (*Doe v. United Air Lines, Inc.* (2008) 160 Cal.App.4th 1500, 1506.) Here, the trial court found that Valenzuela failed to show that he exercised reasonable diligence in discovering and producing the purported new evidence. The court's finding was appropriate.

There is no question that Valenzuela knew of the existence of the evidence before his opposition to the summary judgment motion was filed, since his attorney Boutros stated that she had tried to contact the two new witnesses before she drafted the opposition. But Boutros did not state when she learned of the existence of the new witnesses, when she first contacted them, or what efforts she made to reach them and

obtain their declarations. As to Valenzuela's new declaration, he failed to explain what efforts he made or why he could not have obtained the information upon which the declaration is based earlier. Because Valenzuela and Boutros failed to provide this information, there was no basis for the trial court to find they exercised reasonable diligence. Thus, the court did not abuse its discretion by denying the new trial motion. (*Doe v. United Air Lines, Inc.*, *supra*, 160 Cal.App.4th at p. 1509 ["Generally, when a party seeking a new trial knew, or should have known, about the pertinent evidence before trial but did not exercise due diligence in producing it, the grant of a new trial is error"].)

DISPOSITION

The judgment and post-judgment order are affirmed. Defendants shall recover their costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

WILLHITE, Acting P. J.

We concur:

COLLINS, J. DUNNING, J.*

*Retired Judge of the Orange County Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.